72-152

No. 72-1522

Supreme Court, U. S.
FILED
MAY 11 1973
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

April Term 1973

In the Matter of:

CHARMAR INVESTMENT CO.,
Alleged Bankrupt

CHARMAR INVESTMENT CO.,
Petitioner

vs.

CITY NATIONAL BANK & TRUST CO.,
et al.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN SUPPORT OF PETITION, APPENDIX

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Petition For Writ of Certiorari

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vs.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Warren Burger, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States.

Charmar Investment Co., Petitioner, respectfully prays that a writ of Certiorari be issued to review of the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above cause on April 10, 1973, de-

nying a petition for rehearing and affirming the judgment of the United States District Court for the Southern District of Ohio, Eastern Division, denying Petitioner's jurisdictional claims for dismissal of an Involuntary Bankruptcy petition filed against Charmar Investment Co.

OPINIONS BELOW

The Referee in Bankruptcy and Trial Court, the United States District Court for the Southern District of Ohio, Eastern Division, issued a memorandum opinion and order on July, 1971, in Case No. 55,000. The United States Court of Appeals for the Sixth Circuit issued its decision affirming the trial court of April 10, 1973 in Case No. 72-1503.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254, Title 28 U.S. Code.

The questions presented here were raised in the Trial Court, and in the Court of Appeals.

REASONS FOR ALLOWANCE OF WRIT

Despite the fact that the Courts below denied Petitioner's motion to dismiss on jurisdictional grounds, the petitioner has never had a judicial resolution on the assertion of lack of jurisdiction and the appellate court applied section 39 (c) to resolve a jurisdictional issue.

QUESTION

Does the 10 day provision of §39 (c) of the Bankruptcy Act apply with finality to questions touching on jurisdiction of the Court to hear and determine an amended bankruptcy petition filed after the four month statutory limitation?

STATEMENT

An involuntary petition was filed against Charmar Investment Co. within four months after an alleged act of bankruptcy. The petition was totally defective and insufficient in that it did not allege an act of bankruptcy. The Referee dismissed the petition, and upon motion, permitted respondents to file an amended petition after the four month limitation. The amended petition effectively set forth a new act of bankruptcy. The original petition did not set forth an act of bankruptcy or allege a wrongdoing and therefore is not amendable after the four month limitation. Therefore the Court's jurisdiction is not seasonally invoked and it does not have the power to hear and determine the issue raised in the amended petition.

§15 (C) of the Federal Rules of Civil Procedure apply only when it relates to a claim set forth or attempted to be set forth in the original petition. The original petition does not allege a wrongdoing.

LAW AND ARGUMENT

The Referee in Bankruptcy made a determination on a jurisdictional question. A Petition for Review was not filed pursuant to § 39 (c) of the Bankruptcy Act. If the determination of the Referee is incorrect, why should the Court be permitted to proceed with the bankruptcy. Jurisdictional questions are never waived nor final notwithstanding § 39 (c) of the Bankruptcy Act.

We conclude that § 39 (c) of the Bankruptcy Act does not apply to jurisdictional questions.

Respectfully submitted,

John E. Palcich
Attorney for Petitioner

PROOF OF SERVICE

Petitioner served copies of the foregoing Petition for Writ of Certiorari by mailing same to R. T. O'Brien, 330 E. Town St., Columbus, Ohio 43215; David H. Putnam, 100 E. Broad Street, Columbus, Ohio 43215; and Bradley Hummel, 311 E. Broad Street, Columbus, Ohio 43215, Attorneys for Respondents, by ordinary United States Mail this 5th day of May, 1973.

John E. Palcich
Attorney for Petitioner

APPENDIX A

NO. 72-1503

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In the Matter of:

CHARMAR INVESTMENT CO.
Alleged Bankrupt

CITY NATIONAL BANK & TRUST CO., et al.
Petitioners-Appellees

vs.

CHARMAR INVESTMENT CO.
Alleged Bankrupt-Appellant

ORDER

Before: PHILLIPS, Chief Judge, and CELEBREZZE and PECK, Circuit Judges.

Appellant having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT

Clerk

APPENDIX B

The following is the pertinent part of the opinion of the United States Court of Appeals, Sixth Circuit:

> "A question also arises as to whether the District Court has jurisdiction to consider a proposed amendment to the involuntary petition after a motion to dismiss that petition has been granted. The original petition was filed on May 3, 1971, and was dismissed on June 25, 1971, for insufficient allegations to justify

bankruptcy. In the order of dismissal, the Referee noted that a motion to amend the petition had been presented and filed, and ordered a hearing on the motion for July 1, 1971. On July 6, 1971, the Referee granted a motion to amend the petition.

"*Kroell v. New York Ambassador*, 108 F. 2d 294 (2nd Cir. 1939) held that omitting leave to amend from an order which dismissed an original involuntary bankruptcy petition for insufficiency did not deprive the bankruptcy court of its jurisdiction to allow a later amendment. Even assuming but without deciding that the notation in the order does not constitute leave to amend, it is clear that the bankruptcy court has jurisdiction in view of its general equity powers to set aside an order dismissing the petition for defects in the pleading and later to reinstate the proceedings to permit an amendment of the pleadings. 2 Collier on Bankruptcy § 18.24 (14th ed. 1971).

"Appellant first claims that (1) it was improper for the Court to admit the amended petition more than four months after the alleged act of bankruptcy and (2) the amended petition contained insufficient facts to allege a bankruptcy. We find that Section 39 (c) of the Bankruptcy Act disposes of these claims. Amended in 1960, the Act provides that a petition for review, or a petition to extend the time for filing a petition for review, must be filed within ten days after entry of a referee's order. The 1960 amendment provided a clarification and made compulsory the ten-day limitation. It is clear that the intent was to provide finality to a referee's order unless there was timely direct attack. Since the amendment was enacted, courts have required strict compliance. Appellant has failed to file such a petition for review within the time specified. In fact, the record does not reveal that any petition for review has ever been filed. An appeal to this Court cannot be substituted for a petition for review, and consequently, appellant's claims must be rejected."